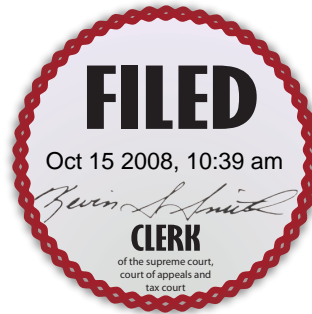


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL MITCHELL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A05-0712-CR-708

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0612-FB-64

October 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Following his guilty plea, Michael Mitchell appeals his twenty-year sentence for one count of Class B felony conspiracy to commit robbery and one count of Class B felony robbery.

We reverse and remand.

ISSUES

1. Whether the trial court abused its discretion in sentencing Mitchell.
2. Whether Mitchell's sentence is inappropriate.

FACTS¹

On December 13, 2006, sixteen-year-old Mitchell, Charles Hunter, Antwan Love, and two juveniles, D.E. and A.M., decided to rob Igloo Frozen Custard in Lafayette. Hunter either obtained or already possessed a handgun that was to be used in the robbery. Love and A.M. entered the store first and posed as customers. Shortly thereafter, Mitchell, Hunter, and D.E. entered the restaurant and ordered everyone to the ground. Mitchell, Hunter, and D.E. then robbed the customers, employees, and the restaurant. During the robbery, Hunter fired a shot from the handgun into the ceiling and struck one of the employees in the head with the butt of the gun. Mitchell, Hunter, D.E., Love, and A.M. then left the restaurant and later divided the proceeds of the robbery.

¹ We note that Mitchell's counsel included Mitchell's Presentence Investigation Report ("PSI") on white paper in his Appellant's Appendix. We remind the parties that Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Indiana Administrative Rule 9(G)(1) provides that the information in a PSI "is excluded from public access and is confidential." Indiana Trial Rule 5(G)(1) requires that such documents be separately identified and "tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

Following an investigation, the police determined that Mitchell was involved in the robbery. On December 22, 2006, the State charged Mitchell with one count of conspiracy to commit robbery, five counts of robbery, seven counts of criminal confinement, six counts of theft, and one count of conspiracy to commit theft.² On June 14, 2007, Mitchell pled guilty to one count of Class B felony conspiracy to commit robbery and one count of Class B felony robbery. Pursuant to the plea agreement, the remaining charges were dismissed, and Mitchell's executed sentence was capped at twenty years.

The trial court held a sentencing hearing on August 10, 2007 at which it accepted Mitchell's guilty plea. The trial court issued a sentencing order that same day. In its order, the trial court found the following aggravating circumstances: (1) the victims recommended an aggravated sentence; (2) the nature and circumstances of the crime, specifically that a shot was fired and that an employee was hit in the head; and (3) the risk that Mitchell would re-offend without community safeguards. The trial court also found a number of mitigating factors including Mitchell's age, his mild mental retardation, his lack of criminal history, and his strong family support. The trial court found that the aggravators outweighed the mitigators and sentenced Mitchell to twenty years on each count with the sentences to be served concurrently. The trial court ordered seventeen years of the sentence to be executed and three years to be served on probation.

² In his appendix, Mitchell included the charging informations for the conspiracy to commit robbery charge and one of the robbery charges. The charging informations indicate that both of these offenses were filed as class B felonies. Mitchell did not provide the charging informations for the remaining charges filed against him. As such, the class of these offenses is unclear.

On November 21, 2007, Mitchell requested permission to file a belated notice of appeal, which the trial court granted on December 4, 2007.

DECISION

1. Abuse of Discretion

Mitchell first argues that the trial court abused its discretion by considering certain aggravating factors and by not finding various mitigating factors. In reviewing a sentence imposed under the current advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement that included “reasonably detailed reasons or circumstances for imposing a particular sentence.” *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. Second, the reasons or omission of reasons given for choosing a sentence are subject to review on appeal for an abuse of discretion. *Id.* The weight given to those reasons, i.e., to particular aggravators or mitigators, is not subject to appellate review. *Id.* Finally, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). *Id.*

An abuse of discretion occurs if the sentence imposed by the trial court is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.* at 490 (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). A trial court abuses its discretion if it: (1) fails to enter a sentencing statement; (2) enters a sentencing statement that includes reasons for imposing a particular sentence, including the finding of aggravating and mitigating circumstances, that the record does not support; (3) enters a sentencing

statement that omits reasons clearly supported by the record and advanced for consideration; or (4) enters a sentencing statement that includes reasons that are improper as a matter of law. *Id.* at 490-91. Generally, if the trial court has abused its discretion, we will remand for re-sentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Id.* at 491. However, even if a trial court abuses its discretion in its identification of aggravators and mitigators or by not issuing a reasonably detailed sentencing statement, we may review the appropriateness of a sentence under Indiana Appellate Rule 7(B) instead of remanding to the trial court. *See Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007).

A. Mitigating Factors

Mitchell argues that the trial court improperly failed to consider his guilty plea as a mitigating factor. On rehearing in *Anglemyer v. State*, 875 N.E.2d 218, 220-21 (Ind. 2007), our Supreme Court noted:

We have held that a defendant who pleads guilty deserves “some” mitigating weight be given to the plea in return. But an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. And the significance of a guilty plea as a mitigating factor varies from case to case. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant’s acceptance of responsibility . . . or when the defendant receives a substantial benefit in return for the plea.

(citations omitted).

Here, Mitchell pled guilty to one count of Class B felony conspiracy to commit robbery and one count of Class B felony robbery. In exchange, the State dismissed

eighteen other counts and capped Mitchell's executed sentence at twenty years. Mitchell received a substantial benefit by pleading guilty. We cannot say that the trial court abused its discretion by not considering Mitchell's guilty plea to be a significant mitigator.

Mitchell contends that trial court should have considered his remorse a mitigating circumstance. At his sentencing hearing, Mitchell stated he was sorry for what he had done and apologized to the victims. This is the only instance in the record where Mitchell expressed remorse for his actions. Although a defendant's remorse may serve as a valid mitigating circumstance, "[i]t is within the sentencing court's discretion to determine whether remorse should be considered as a 'significant' mitigating factor." *Evans v. State*, 727 N.E.2d 1072, 1083 (Ind. 2000). Given Mitchell's single expression of remorse, the trial court did not abuse its discretion by not considering this a significant mitigating factor.

Mitchell also asserts that the trial court should have considered the hardship that placement in an adult prison would have on him. We disagree with Mitchell's assessment that the trial court "never rendered any decision on this mitigating factor or made any determination about it in its sentencing statement." (Mitchell's Br. 8). The trial court found Mitchell's age and mild mental retardation to be mitigators. It is these factors that serve as the basis for Mitchell's challenge to placement in an adult facility. Because the trial court considered these factors, we cannot say it overlooked this issue.

Therefore, the trial court did not abuse its discretion by not finding these circumstances to be mitigating factors.

B. Aggravating Factors

The trial court found three aggravating circumstances. The first was the nature and circumstances of the crime. With regard to this aggravating factor, Mitchell claims that the trial court's sentencing statement is insufficient because it is unclear what circumstances of the offense warranted aggravation. The trial court, however, specifically stated in its sentencing order that the circumstances of the offense that warranted aggravation were that "[a] shot was fired and an employee was hit in the head." (App. 99). The trial court's sentencing statement is sufficiently clear as to the circumstances of the offense that it found warranted aggravation.

Additionally, Mitchell argues that the nature and circumstances of the offense is an improper aggravator because the circumstances the trial court considered were also essential elements of the offenses to which he pled guilty. Under the previous presumptive sentencing scheme, a material element of a crime could not be used as an aggravating factor to support an enhanced sentence. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). Mitchell, though, was not sentenced under the presumptive sentencing scheme, but under the new advisory sentencing scheme that came into effect in 2005. Under the advisory sentencing scheme, a trial court can "impose any sentence within the statutory range set for the crime, 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'" *Pedraza v. State*, 887 N.E.2d 77, 79 (Ind. 2008) (quoting Ind. Code § 35-38-1-7.1(d)). Consequently, so long as the sentence is within the statutory range, a trial court does not enhance a sentence upon finding aggravating circumstances. *Id.* at 80. Here, the sentences imposed by the trial court were

within the statutory range. *See* Ind. Code § 35-50-2-5 (specifying that individuals who commit a class B felony shall be imprisoned for a fixed term of between six and twenty years with the advisory sentence being ten years). Even if the trial court considered an essential element of Mitchell's offenses as an aggravating circumstance, under the advisory sentencing scheme, it was not enhancing Mitchell's sentence. As such, the trial court did not abuse its discretion by considering the nature and circumstances of the offense as an aggravating factor.

The second aggravating factor found by the trial court was that Mitchell was at a "high risk" to re-offend. (App. 99). Mitchell contends there is no evidence to support this aggravator, and we agree. A Level of Services Inventory performed by the probation department showed that if no services are provided to him, there is a 31.1% chance that Mitchell will re-offend within the next year. A 31.1% chance that Mitchell will re-offend if no services are provided to him does not constitute substantial evidence that Mitchell is at a *high risk* to re-offend. The trial court abused its discretion by considering this fact an aggravating circumstance because the evidence in the record does not support this finding.

The third aggravating factor found by the trial court was that the victims recommended an aggravated sentence. "Recommendations from victims or their representatives are not mitigating or aggravating factors as those terms are used in the sentencing statute. However, such recommendations may properly assist a court in determining what sentence to impose." *Haddock v. State*, 800 N.E.2d 242, 247 (Ind. Ct. App. 2003). Thus, the trial court did not err in considering this evidence, but it abused its

discretion by finding the victims' recommendations to be an aggravating circumstance. *See id.*

In sum, we conclude that two of the three aggravating factors found by the trial court were improper. Given this, we cannot say with confidence that the trial court would have imposed the same sentence. In this situation, we have the option to either remand this case to the trial court for re-sentencing, *see Anglemyer*, 868 N.E.2d at 491, or retain jurisdiction and review the appropriateness of Mitchell's sentence under Indiana Appellate Rule 7(B). *See Windhorst*, 868 N.E.2d at 507. We choose the latter option.³

2. Appropriateness

Mitchell argues that his sentence is inappropriate given the nature of the offense and the character of the offender. Pursuant to Indiana Appellate Rule 7(B), we have the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). The defendant bears the burden of persuading the reviewing court that his sentence is inappropriate. *Id.*

³ Mitchell also contends that the trial court improperly weighed and balanced the aggravating and mitigating factors. Our Supreme Court, however, has specifically stated that the weighing of aggravating and mitigating factors is not subject to appellate review. *Anglemyer*, 868 N.E.2d at 491. As such, we will not address this claim.

We begin by considering the nature of Mitchell's offenses. Mitchell was involved in the planning of and participated in an armed robbery with multiple victims. During the robbery, a shot was fired inside the restaurant and an employee was hit in the head with the butt of a gun. The serious nature of Mitchell's offenses does not suggest that his sentence is inappropriate.

As for Mitchell's character, we note that he was only sixteen-years-old at the time of the offense and that he suffers from mild mental retardation. Mitchell has no criminal history. At the sentencing hearing, Mitchell stated that one of his goals was to go back to school and complete his education. The trial court found that Mitchell had good family support. Mitchell's mother testified that as the oldest of her six children, Mitchell was a great help to her around the house. Mitchell did plead guilty and express remorse for his actions. Although we have concluded that both of these facts are not significant mitigators, they do reflect positively on Mitchell's character.

In assessing the appropriateness of Mitchell's sentence, it is relevant to consider the sentence Mitchell's co-defendant Charles Hunter received. Hunter agreed with Mitchell, Love, D.E., and A.M. to rob Igloo Frozen Custard. Prior to the robbery, Hunter either obtained or already possessed a handgun that was to be used in the robbery. During the robbery, Hunter fired a shot from the handgun inside the restaurant and struck an employee in the head with the butt of the gun. Like Mitchell, the State charged Hunter with one count of conspiracy to commit robbery, five counts of robbery, seven counts of criminal confinement, six counts of theft, and one count of conspiracy to commit theft. Hunter pled guilty to one count of class B felony conspiracy to commit robbery and one

count of class B felony robbery. The trial court merged Hunter's convictions and sentenced him to twenty years, with eighteen years executed and two years served through Tippecanoe County Community Corrections.

On appeal, Hunter argued that his sentence was inappropriate. In considering the nature of Hunter's offense and his character, another panel of this Court noted:

Regarding the nature of the offenses, our review of the record reveals that there are no circumstances in this case that would warrant an enhanced sentence for conspiracy to commit robbery as a class B felony as charged. As for Hunter's character, the record shows that he was eighteen years old when he committed the offenses. His prior offenses, which consist of operating a vehicle while never receiving a license and false informing as a juvenile, were relatively minor and nonviolent. Additionally, Hunter pleaded guilty and was willing to make restitution. Hunter has the support of his family, and he tested in the low "needs" range on the LSI-R test.

Hunter v. State, No. 79A02-0710-CR-901, slip op. at 10 (Ind. Ct. App., May 16, 2008) (citations omitted). The panel ultimately concluded that "[w]hen considering the nature of the offense and Hunter's character, we cannot agree that the twenty-year sentence with eighteen years executed and placement in community corrections for two years is appropriate." *Id.* at 11. The panel revised Hunter's sentence "to the advisory term of ten years of incarceration with two years suspended to community corrections." *Id.*

In this case, Mitchell played a lesser role in the robbery than Hunter. Mitchell did not possess or fire a gun during the robbery, nor did he use the butt of a gun to strike an employee. Additionally, unlike Hunter, Mitchell has no prior convictions. Given these distinguishing facts, we believe it would be inconsistent to simply affirm Mitchell's sentence when another panel of this Court has reduced Hunter's sentence to the advisory

sentence. Although the nature of Mitchell's offenses is serious, based on Mitchell's character and the fact that Hunter has received a reduced sentence, we conclude that Mitchell's sentence is inappropriate. Therefore, we remand this cause to the trial court with instructions that it revise Mitchell's sentence to the advisory term of ten years with two years suspended to probation.

Reversed and remanded.

FRIEDLANDER, J., concurs.

BARNES, J., dissents with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL MITCHELL,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 79A05-0712-CR-708
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

BARNES, Judge, dissenting with separate opinion

With all due respect to the view of my colleagues, I believe the sentence modification that they make is neither warranted nor deserved. Mitchell committed a bold and brazen armed robbery of a commercial establishment where customers were present and the risk of serious injury or worse was patent.

I understand that the sentence of a co-defendant, Hunter, was reduced to the advisory sentence by another panel of this court. However, our task is to bring our best judgment to bear on this case, under these facts, concerning this defendant.

As for the nature of the offense, Mitchell and four other men planned a robbery. In accordance with the plan, one of the men obtained a handgun that was used in the commission of the robbery. Mitchell and his cohorts took personal property from the customers, at least one employee, and the store. During the robbery, one of the men fired

a shot and an employee was bashed with the gun. This crime was well-planned, involved a handgun, and was committed against several victims. Father Flanagan never met these young men.

As for his character, I acknowledge that Mitchell was only sixteen at the time of the offense, that he had no criminal history, and that he has mild mental retardation. Nevertheless, Mitchell admitted to using marijuana daily and occasionally consuming alcohol. Further, although Mitchell pled guilty and showed remorse for his actions, he received a substantial benefit for his guilty plea. I applaud Mitchell's desire to continue his education while incarcerated and his acceptance of responsibility. However, as Mitchell recognized, it was ultimately his decision to rob the store. Considering the nature of the offense and the character of the offender, I would affirm Mitchell's sentence.